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SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 283.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. McCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY, a Corporation; SPOKANE & PALOUSE LAND COMPANY, a Corporation; PALOUSE MILL COMPANY, a Corporation, and A. F. PUGH,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

ARGUMENT FOR PLAINTIFFS IN ERROR.

This case is before the court on a writ of error directed to the supreme court of Washington. The action was commenced in the superior court of Whitman county, Washington, to cancel a patent

issued to the defendant under the Homestead Law purporting to convey title to lots 10, 11, 14 and 15 of section one (1), township sixteen (16) north, range forty-five (45) east of the Willamette Meridian, a tract of land situated within the indemnity limits of the Northern Pacific grant.

The title of the plaintiffs is derived by purchase from the Northern Pacific Railroad Company under its grant by act of congress, approved July 2, 1864 (13 Stat. 365).

The supreme court of Washington sustained a demurrer to the complaint and entered judgment dismissing the action.

The complaint alleges that by the third section of the act of congress, approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company as follows:

"*And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the

commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted,or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." (Transcript, p. 1).

It is then alleged that on October 4, 1880, the Northern Pacific Company definitely located that portion of its road opposite the premises in controversy by filing a map of such definite location, approved by the secretary of the interior, in the office of the commissioner of the general land office (Transcript p. 3); that upon a definite location the land in question fell within the 40-50 mile or indemnity limits of the grant; that upon such definite location the commissioner of the general land office withdrew from sale, homestead and pre-emption entry all the odd-numbered sections within the indemnity limits opposite that portion of the line so located; that this order of withdrawal was received at the United States district land office at Colfax, Washington, November 30, 1880 (Transcript p. 3).

It is alleged that the land in controversy was at the date of definite location and at the date of withdrawal public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights (Transcript p. 3).

The complaint then alleges that on December 15,

1883, the railroad company selected the land in controversy, under the directions of the secretary of the interior, as indemnity in lieu of lands excepted from the primary limits of the grant and filed its selection list and paid the fees in the manner required by law and by the regulations of the interior department; that the district land officers on December 17, 1883, allowed and approved said selection list and transmitted the same to the commissioner of the general land office (Transcript p. 5).

The complaint alleges that after the selection and in the year 1887 the railroad company conveyed the land to the plaintiff, William L. Powers (Transcript, p. 6).

It is then alleged that thereafter and on October 26, 1887, for the purpose of complying with the other instructions of the interior department issued subsequent to the selection, the railroad company filed a certain list, designating the losses in lieu of which the land in controversy had been selected in December, 1883, and thereafter in 1892 and 1893, in compliance with certain further instructions the losses specified in 1887 were rearranged, tract for tract, with the lands so selected and that it appears, from said rearranged list, that the lands in controversy were selected in lieu of an equal quantity of land situated within the forty mile or primary limits of the grant within the state of Washington and at the date of the definite location included within a reservation set apart for the Yakima Indians (Transcript p. 6)

It is then alleged that the plaintiff, William L. Powers settled on the land in controversy in 1881 with the intention of purchasing the same from the railroad company, and on March 1, 1883, leased lot 10 of the land in controversy to the defendant Jacob Slaght, who occupied the premises and paid rent to Powers until 1887. On October 31, 1887, however, Slaght presented his application at the district land office to make homestead entry of the whole of the premises in controversy (Transcript p. 7). Upon this application of the defendant a hearing was ordered before the district land officers to determine the status of the land at the date of selection and in July, 1889 the register and receiver rendered their decision and held that the land was excepted from the operation of the grant by reason of the settlement of the plaintiff William L. Powers, and that the said defendant Slaght settled on the land as the tenant of Powers (Transcript pp. 7-8). From this decision the railroad company appealed to the commissioner of the general land office and that officer on April 13, 1895, rendered a decision, set out at length in the complaint, in which he reviews the testimony offered before the register and receiver and holds that the railroad company's selection should be cancelled solely upon the ground that the premises in controversy were occupied by the defendant Slaght at the date of selection, notwithstanding the fact that Slaght was a tenant of Powers and notwithstanding the fact that the land was withdrawn from homestead

and pre-emption by the executive order of November 30, 1880 (Transcript pp. 8 to 10).

Thereafter the railroad company appealed to the secretary of the interior, who affirmed the decision of the commissioner, and in the year 1897 patent was issued to the defendant, purporting to convey the land in controversy. (Transcript p. 10).

The complaint alleges that the officers of the land department committed an error of law in cancelling the selection and issuing the patent to the defendant (Transcript p. 11).

It is further alleged that the plaintiffs, other than William L. Powers, claim title to certain portions of the lands which comprise a portion of the town site of Palouse City, under conveyances made to them by William L. Powers and his grantees and that the plaintiff, William L. Powers, has conveyed to various persons certain other portions of the land in controversy and by his deeds of conveyances has covenanted and agreed that he will warrant and defend the title so conveyed (Transcript pp. 11-12).

It is further alleged that the plaintiffs and the various grantees of William L. Powers are in possession of the premises in controversy and that the defendant is threatening to commence numerous actions at law to dispossess the plaintiffs and is also threatening to enter upon said premises, forcibly and without right, and dispossess the said plaintiffs and the other grantees of the said William L. Powers (Transcript p. 12).

The complaint concludes with a prayer that the defendant may be enjoined from bringing separate suits against the plaintiffs or persons claiming under William L. Powers, and that the patent issued to the defendant may be decreed to be void and cancelled as a cloud upon the title of the plaintiffs, or that the defendant may be decreed to hold the legal title in trust for the benefit of said William L. Powers and his grantees (Transcript pp. 12-13).

To this complaint the defendant interposed a demurrer, specifying numerous grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action (Transcript p. 14).

The supreme court of Washington sustained the demurrer upon the ground above specified without considering the other grounds, affirming the judgment of the superior court for Whitman county and dismissed the action. No opinion was filed, but the case was decided upon a memorandum referring to the opinion in *Moore v. Carmode,* No. 285 on the present calendar and heard in argument with the case at bar (Transcript p. 18).

ASSIGNMENT OF ERRORS.

Errors are duly assigned in the record (Transcript, pp. 19-21) but may be briefly stated, as follows:

I.

The court erred in sustaining the demurrer to the complaint and in entering judgment dismissing the action.

II.

The court erred in holding that the patent issued to the defendant is conclusive of the rights of the parties.

III.

The court erred in holding that no rights were acquired by virtue of the selection of the premises under act of congress approved July 2, 1864.

IV.

The court erred in holding that the settlement of the defendant excepted the land in controversy from the grant to the Northern Pacific Railroad Company.

V.

The court erred in holding that the withdrawal of the land in controversy was void.

VI.

The court erred in failing to hold that the title of plaintiffs was initiated prior to the title of defendant.

VII.

The court erred in denying plaintiffs' title to the land in controversy claimed under the act of congress approved July 2, 1864.

MERE OCCUPATION WAS INSUFFICIENT TO DEFEAT THE GRANT.

It appears from the decision of the commissioner of the general land office, set out at length in the complaint, that the selection of the railroad company was cancelled upon the sole ground of the occupancy of the premises by the defendant at the date of selection.

It is submitted that it sufficiently appears that this occupation by the defendant was as the tenant of William L. Powers, who intended to, and in fact did, purchase the land from the railroad company; but in any event, whatever was the nature of the settlement of the defendant it affirmatively appears that his first application to enter the land was made on May 31, 1887, nearly four years after the selection by the railroad company.

It is submitted that the law was settled by this court in *Northern Pacific Railroad Company v.*

Colburn, 164 U. S. 383, that mere settlement without a filing or entry creates no claim within the meaning of the Northern Pacific grant.

In that case Colburn sued the Northern Pacific Company to recover a sum of money paid by him as contract price on a tract of land sold to him by the company, alleging that the company had no title to the land and that it was excepted from the grant. The company answered, alleging that the land was within the primary limits of its grant and at the date of the grant and the date of definite location when its rights attached, the records of the land office showed no preemption, homestead or other claims or rights; but admitted that at the date of definite location one Kelly was occupying and cultivating the land, but that he had made no entry or filing in the local land office. The supreme court of the state (Montana) sustained the demurrer to the answer, on the ground that it appeared that the land department had held the tract to be excepted from the grant. Mr. Justice Brewer, delivering the opinion of the court, said:

"In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land and its freedom from record claims, were such as to prima facie vest a title in the company. It is true, it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the prem-

ises at the time of the filing of the map of definite location unaccompanied by any filing of a claim in the land office, then or thereafter, excludes the tract from the operation of the land grant, the decision of the supreme court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office. Thus in the case of *Kansas Pacific Railway v. Dunmeyer,* 113 U. S. 629, 644, Mr. Justice Miller, speaking for the court, said:

"'Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation.'

"This language was quoted and the decision reaffirmed in *Hastings & Dakota Railroad v. Whitney,* 132 U. S. 357; *Whitney v. Taylor,* 158 U. S. 85. In *Lansdale v. Daniels,* 100 U. S. 113, 116, it was ruled that 'such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that the settlement alone is not sufficient for that purpose.' See also *Maddux v. Burnham,* 156 U. S. 544. Now, in this case the allegations are that Kelly never made any entry in the local land office and the decision of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties and which is open to review in the courts."

And in conclusion said further: "For the reasons above indicated, because the decision of the

land department was only on matters of fact and did not include the law of the case, and as such *facts so found were not of themselves sufficient to disturb the title of the railroad company,* the judgment is reversed and the case remanded to the supreme court of the state for further proceedings not inconsistent with this opinion."

Counsel for defendants urge with much earnestness that the question of the effect of mere occupancy was not presented in the Colburn case. The language of the opinion seems too plain to justify argument upon this contention, but it may be observed in reply that the suggestion finds a conclusive answer in the denial by the court of the motion to dismiss for the lack of a federal question. The answer of the railroad company to the complaint of Colburn set up facts showing the land was free and clear at definite location, admitting the occupancy of Kelly. Upon these facts the state court denied the title claimed by the company under the federal grant. This court held that the effect of Kelly's settlement presented a federal question and held further that the effect of the occupancy was not to defeat the grant.

And this is the construction of the opinion upon which the interior department has acted since the decision was annnounced.

Wight v. Central Pacific R. R. Co., 27 L. D. 182; *Central Pacific R. R. Co. v. Hunsaker*, 27 L. D. 297; *Union Pacific R. R. Co. v. Grant*, 28 L. D. 18; *Union Pacific R. R. Co. v. Fisher*, 28 L. D. 75, 83.

The supreme court of Minnesota has also acted

upon this plain construction of the Colburn case. *McHenry v. Nygaard*, 72 Minn. 2.

THE WITHDRAWAL.

It appears by the complaint that the officers of the land department committed a further error of law in canceling the selection of the railroad company and allowing the entry of the defendant, for the reason that during the whole period of the defendant's occupation of the premises the land was withdrawn from preemption and homestead entry.

If the lands were withdrawn up to the time of the selection by the railroad company, no rights could be acquired under the public land laws which would defeat the selection. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of preemption, and what lands may not be acquired in this manner. These sections are as follows:

Section 2257: "All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of preemption, under the conditions, restrictions, and stipulations provided by law."

Section 2258: "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of preemption, to-wit:

First: *Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.*

Second: Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third: Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth: Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by "proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman,* 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the preemption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey the land in question, based upon a soldier's additional homestead entry. The patent was dated

June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and preemption or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn up to the date of the selection by the railroad company, and during the whole period of the defendant's settlement, and when the defendant tendered his pre-

emption declaratory statement, neither the occupation of the defendant, nor his filing, made after selection, could operate to defeat the grant.

But it is contended by the defendant that the order of the commissioner of the general land office of November 30, 1880, was void and ineffective to reserve the land from preemption. This was the view taken by the officers of the land department.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork,* so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the

state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield,* 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to the United States by any act of congress, or *in any*

other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * *"*

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales either public or by private entry. Such notice was given the same day the grant was made in

1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman,* 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles,* 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach,* 156 U. S., 359; *Spencer vs. McDougal,* 159 U. S., 62; *Muser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.,* 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing defendant's entry notwithstanding the withdrawal of the indemnity lands, are based upon the previous decisions of the secretary in the cases of *Northern Pacific Railroad Company vs. Guilford Miller,* 7 Land Decisions 100 and *Jennie L.*

Davis vs. Northern Pacific Railroad Company, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

First: That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in *Buttz vs. Northern Pacific Railroad Company,* 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be ma.le

after the definite location of the road. He says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line

of the road being only approximately determined by the map of general route, lands in the indemnity belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indem-

nity belt of the company's grant would have been subject to appropriation for a long period of time during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were surveyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicated on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant between the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention

that the company should enjoy to the full extent the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, *"carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of

the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the secretary of the interior,*" and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach,* 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

These withdrawals were not merely executive acts, but the latter one, at least, was in obedience

to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn

by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby*

extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided,* that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further,* that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further,* that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-

emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause

in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'definite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857),*when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853,with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act

of 1853, to $2.50 per acre. The right of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853

extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864,the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant

to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This

letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.
Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,
"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a consideration of the acts of 1841 and 1853 here dis-

cussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although

two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have

been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule: "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion that the contemporaneous construction of the interior department is correct and that the power of withdrawal existed, is sustained by the supreme court of North Dakota in *Hewitt v. Schultz*, (No. 241 on the present calendar), heard in argument with the case at bar, and by *Thompson v. St. P. M. & M. Ry. Co.*, 83 Fed. Rep. 546; *Southern Pacific R. R. Co. v. Wiggs*, 43 Fed. Rep. 333, and *Southern Pacific R. R. Co. v. Groeck*, 87 Fed. Rep. 970.

In the last case above cited, decided by the cir-

cuit court of appeals for the ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866, (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION.

The complaint alleges that the railroad company selected the land in controversy by filing a selection list in the proper land office, prepared in accordance with the rules and regulations of the interior department; that this list was filed on December 12, 1883, and was accepted and approved by the district land officers on December 17, 1883, and all the fees required by law were paid at the time of this selection.

It is alleged further that on October 26, 1887, complying with certain other instructions of the interior department, issued subsequent to the selection, the railroad company filed a certain list designating the losses in lieu of which the land in controversy had been selected, and thereafter in 1892 and 1893, in compliance with certain other and further instructions, rearranged the losses specified in 1887, tract for tract, with the lands selected, and that by such rearrangement the lands in controversy were selected in lieu of an equal quan-

tity of lands situated within the forty mile or primary limits of the grant within the state of Washington and at the date of the definite location included within a reservation set apart for the Yakima Indians.

The allegation of the complaint is categorical that the selection was made in compliance with the rules and regulations of the secretary of the interior. No tract of lost land was specified as a basis for the selection until 1887, for by the express instructions of Secretary Teller, issued May 28, 1883, the duty of specifying the basis for selections was properly committed to the commissioner of the general land office (12 Land Decisions 196).

It was urged by the defendant in the court below that, conceding the land department to have rendered an erroneous decision upon the questions already discussed, yet the plaintiff is remediless for the reason that the land department has never approved the railroad company's selection. This argument is based upon the ground that it is committed to the secretary of the interior exclusively to determine whether a given tract of land in the indemnity limits of the grant is subject to selection and whether an equal quantity of land has been lost from the primary limits for which indemnity may be taken.

It is undoubtedly true that in the first instance these questions are committed to the secretary of the interior, and in so far as their determination depends upon matters of fact, his conclusions are final. But it does not follow when that officer can-

cels a selection under an erroneous view of the law and fails to pass upon the question of the status of the land selected or upon the question of lands being lost from the primary limits for which indemnity may be taken, that this failure will defeat the grant.

In *St. Paul & Sioux City Ry. Co. v. Winona & St. Peter Rd. Co.*, 112 U. S. 720, it appeared that certain lands were situated within the indemnity limits of two grants, one made to the state of Minnesota for the benefit of the St. Paul & Sioux City Company, and one for the benefit of the Winona & St. Peter Company.

The grants were made by acts of congress of the same date, and it appeared that the St. Paul & Sioux City Company had made the earlier location of its line. Upon these grounds the interior department held that the right of that company to lands within its indemnity limits was superior, and although the Winona Company selected the lands first, the lands were certified to the state of Minnesota for the benefit of the St. Paul Company.

This court, speaking of the right of selection, said:

"Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land.

"In this case, and for these reasons, priority of selection secures priority of right. * * *

"It is no answer to this to say that the secretary

of the interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80; *Gibson v. Chouteau*, 13 Wall. 92, 102; *Shepley v. Cowen*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 536."

It is apparent in this case that there was no finding by the secretary of the interior that at the date of selection of the lands in question by the Winona Company, they were of the class of lands subject to selection, or that an equal quantity of lands had been excepted from the place limits of the grant for which indemnity might be taken, for the selection of the Winona Company was canceled upon the ground of the earlier location of the St. Paul Company.

That the courts will not permit a grant to be defeated by the failure of the secretary of the interior to pass upon questions of fact necessary to the approval of an indemnity selection, is further illustrated by the case of *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. In that case the Northern Pacific Company filed a bill to hold the St. Paul & Pacific Company trustee of the legal title of certain lands situated within the indemnity limits of its grant

which had been certified to the state of Minnesota, and deeded by the state of Minnesota to the St. Paul & Pacific Company, upon the ground that the certification to the state was made under an erroneous construction of the two grants under which the secretary of the interior held that the grant to the state of Minnesota for the benefit of the St. Paul & Pacific Company was prior to the grant to the Northern Pacific Company. This court held that the grant to the Northern Pacific Company was prior in time and that the lands in question were withdrawn for the benefit of the Northern Pacific Company and that the secretary of the interior committed an error of law in certifying the lands to the state of Minnesota. It was objected, however, by the St. Paul & Pacific Company that the Northern Pacific Company was not in privity with the United States and could not complain of the certification to the state, for the reason that the lands in question had never been selected by the Northern Pacific Company. In this connection the court said:

"As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary in selecting from them, for they were all appropriated."

The selections never having been made, it is apparent that the court assumed the duty of passing

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upon the character of the lands, and the question of the deficiency in the indemnity limits, and an examination of the record in that case will show that the fact of the deficiency was not established by a finding of the interior department, but by evidence based upon an examination of the public records.

And the reason for the rule that where the secretary of the interior fails to find the facts necessary to the approval of an indemnity selection, and patents are issued to other parties without a finding of such facts, the courts will perform the duty originally committed to the secretary, is found in the decisions of this court in cases involving lands claimed under the swamp land grants to the various states.

By these grants the states took all those legal subdivisions of lands, the major portion of which was so wet and swampy as to be unfit for cultivation. By the terms of the grants it was made the duty of the secretary of the interior to ascertain the character of the land, and upon identification in this manner, to furnish lists of the lands so determined to be swamp, to the states. And this court has uniformly held that where the secretary neglects or refuses to pass upon the question of the character of the lands the matter may be examined by the courts.

In *Hannibal & St. Joe. R. R. Co. v. Smith*, 9 Wall. 95, the question was presented. In this case the railroad company claimed under a grant from which lands theretofore granted were, of course,

excepted, and brought an action to recover a tract of land from one Smith, who claimed the land as swamp land granted by the United States to the state of Missouri, and conveyed by the state to him. It was admitted that if the land did not pass to the state by the swamp land grant, it passed to the railroad company. The secretary of the interior had failed to pass upon the question of the character of the land and the court below allowed the grantee of the state to show by parol evidence that the land was swamp in fact. This court said:

"By the second section of the act of 1850 it was made the duty of the secretary of the interior to ascertain this fact and furnish the state with evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress, and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary of the interior to ascertain and make out lists of these lands, the right of the state to them could not be defeated by that delay. * * *

"The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

"Any other rule results in this, that because the secretary of the interior has failed to discharge his duty in certifying these lands to the state, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they are of the class excluded from the plaintiff's grant."

In *French v. Fyan*, 93 U. S. 169, commenting on *Hannibal & St. Joe Railroad Company v. Smith*, *supra*, and the admission of parol testimony in that case for the purpose of identifying the land as falling within the grant, the court said:

"The admission was placed expressly on the ground that the secretary of the interior had neglected or refused to do his duty; that he had made no selections or lists whatsoever, and would issue no patents, although many years had elapsed since the passage of the act. * * *

"There was no means, as this court has decided, to compel him to act; and if the party claiming under the statute in that case could not be permitted to prove that the land which the state had conveyed to him as swamp land, was in fact such, a total failure of justice would occur, and the entire grant of the state might be defeated by this neglect or refusal to do his duty."

See also *Wright v. Roseberry*, 121 U. S. 488, where the cases on this subject are reviewed and the foregoing propositions are affirmed.

As said by the court in the case of *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co.*, *supra*, the arbitrary refusal of the secretary cannot defeat the right which the court declared to be a vested right acquired by a selection of land properly subject to selection, when made in accordance with the statute.

It is submitted that the judgment of the Supreme Court of Washington should be reversed.

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